

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Mao v Minister for Immigration and Multicultural Affairs [2025]

FedCFamC2G 647

File number(s):	SYG 3038 of 2020
Judgment of:	JUDGE DOUST
Date of judgment:	7 May 2025
Catchwords:	MIGRATION - application for student visa – mandatory requirement to show current enrolment in course of study – applicant failed to provide evidence of Confirmation of Enrolment - criteria for grant of the visa not met – Tribunal compelled to affirm decision under review - no attendant jurisdictional error – application dismissed
Legislation:	<i>Migration Act 1958</i> (Cth) ss 65, s 349(4), 476 <i>Migration Regulations 1994</i> (Cth) sch 2 pt 500 cls 500.211 and 500.212
Division:	Division 2 General Federal Law
Number of paragraphs:	33
Date of hearing:	13 February 2025
Place:	Sydney
The Applicant:	In person, with the assistance of a Mandarin interpreter
Solicitor for the First Respondent:	Mr M Gao, HWL Ebsworth Lawyers
The Second Respondent:	Submitting appearance save as to costs

ORDERS

SYG 3038 of 2020

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: FANGLIAN MAO
Applicant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE DOUST

DATE OF ORDER: 7 MAY 2025

THE COURT ORDERS THAT:

1. The application is dismissed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE DOUST:

INTRODUCTION

1 This is an application for judicial review pursuant to s 476 of the *Migration Act 1958* (Cth) (the Act) in respect of a decision of the then Administrative Appeals Tribunal (Tribunal) made on 26 November 2020. The application was lodged with the Court on 30 December 2020.

2 The Tribunal affirmed an earlier decision of the first respondent, the (then) Minister for Immigration, Citizenship and Multicultural affairs, now Minister for Immigration and Multicultural Affairs (the Minister), to refuse the applicant's application for the grant of a Student (Temporary) (class TU) (subclass 500) visa (the visa).

3 The Tribunal was not satisfied that the criteria for the visa were satisfied as the applicant was not enrolled in a "course of study" as defined in the *Migration Regulations 1994* (Cth) (Regulations).

4 For the Court to grant the relief sought by the applicant, it must be satisfied that the Tribunal's review is attended by jurisdictional error.

5 For reasons which follow the Tribunal did not err, and the application should be dismissed.

BACKGROUND

6 The applicant is a citizen of the People's Republic of China. She travelled to Australia on visitor visas on several occasions from February 2015.

7 On 14 September 2016, the applicant made an application for a partner visa based on her relationship with an Australian citizen. That application was refused on the basis that the applicant's relationship had been contrived for migration purposes and was not a genuine and continuing relationship.

8 On 30 October 2017, whilst she was in Australia, the applicant gave birth to a son. The child required significant medical treatment from February 2018 for a neurological disorder, brain injury, and epilepsy.

9 On 20 February 2019, the applicant made an application to the Department of Home Affairs (Department) for a student visa. The applicant stated that she wished to undertake studies in

English to enable her to communicate more effectively with the doctors who were treating her infant son, who had suffered a brain injury and had epilepsy.

10 That application was refused in a decision made by a delegate of the Minister for Home Affairs on 25 June 2019 (**primary decision**). In the primary decision the delegate concluded that the applicant did not satisfy the requirement in cl 500.212 of sch 2 to the Regulations. That clause imposes a criterion for the grant of the visa that the applicant is a genuine applicant for temporary entry and stay as a student.

11 On 15 July 2019, the applicant made an application to the Tribunal for review of the primary decision. That application was supported with a Confirmation of Enrolment (COE) in an English course starting on 15 April 2019 and concluding on 12 April 2020.

12 In her personal statement to the Tribunal dated 19 May 2020, the applicant stated that from her divorce in August 2019, she had to stay home to take care of her child and was unable to continue attending classes in her course. She also stated that she had been attending English classes through her local church until those classes stopped due to the COVID-19 pandemic.

13 The Tribunal affirmed the decision under review in an oral decision delivered at the hearing on 26 November 2020. In the written statement of reasons, the Tribunal stated that there was no evidence before it that the applicant was enrolled in any course of study, and it was not satisfied at the time of its decision that the applicant was enrolled in a course of study, and concluded that cl 500.211 of sch 2 to the Regulations was not met, and accordingly the criteria for the grant of a subclass 500 student visa were not met.

APPLICATION TO THE COURT

14 By her originating application lodged with the Court on 30 December 2020, the applicant seeks judicial review of the Tribunal's decision pursuant to s 476 of the Act.

15 The application also provides details of the primary decision in response to a prompt to identify the migration decision in respect of which the application was made. However, the single ground in the application makes it clear that it is the Tribunal decision about which the applicant complains.

16 The ground is as follows:

The Tribunal failed to take into account substantially of Applicants' explanation (*sic*) to the Tribunal.

THE HEARING

17 The applicant's application was listed for hearing on 13 February 2025. The applicant had the assistance of a Mandarin interpreter.

18 The Court received the following into evidence:

- (1) affidavit of the applicant dated 10 December 2020; and
- (2) a court book prepared by the first respondent which contained relevant documents such as the applicant's visa application, records of the Department and Tribunal, the primary decision and the Tribunal decision the subject of the application.

19 At the commencement of the hearing, I explained to the applicant that the Court is not empowered to grant her the visa she was seeking, but that it may only intervene when it is persuaded that there has been jurisdictional error in the decision that is the subject of the review.

20 The applicant was then invited to make submissions.

21 When she did so, the applicant referred to the matter as "the tragedy of the student visa". She said that she had received a phone call saying that she didn't spend enough time at school. She said "they" (presumably the Department) called her school to verify and couldn't find her record. She said that after receiving her COE she had attended classes but was also looking after her child and was impacted by the arrival of the COVID-19 pandemic. She stated that because they could not find her record, they refused her application and subsequently, she was unable to attend class. As she was no longer able to attend class, she attended English classes through her church. She still believes that in order to learn English she needs the (learning) environment, and without a school and being surrounded by others it is difficult to make positive improvement.

22 The applicant submitted that if she could attend school, she would benefit and that would have a positive influence on her study. She said she felt the reason they used to refuse her application was not sufficient and she wanted to go back to school to learn the English language because that was very important to her.

23 The first respondent relied on an outline of submissions filed with the Court and submitted that having regard to the evidence before the Tribunal at the time it made its decision, the Tribunal had no discretion to do anything other than affirm the decision under review.

24 The first respondent's argument proceeded as follows:

- (3) It was a criterion for the grant of the visa that the applicant be enrolled in a course of study, being a registered course of study, at the time the application is considered;
- (4) The Tribunal had extended an invitation to the applicant to provide evidence of such enrolment;
- (5) The Tribunal had before it both the offer of enrolment that was made to the applicant by Duke College, and the COE record that was created after she enrolled. They showed that the course was to be undertaken between April 2019 and April 2020;
- (6) The later PRISM record (a record of the Department of Education, Skills and Employment) that was before the Tribunal showed that the COE had been cancelled on 25 October 2019 due to unsatisfactory attendance;
- (7) The applicant had submitted a statement to the Tribunal, dated 19 May 2020 headed "Personal Statement" which explained that from August 2019 she had been unable to attend the classes in the course in which she was enrolled because she was divorced from that time and had to take care of her child by herself;
- (8) There was no evidence that the applicant was enrolled in a relevant course of study at the time of the Tribunal decision; and
- (9) The Tribunal finding that the applicant did not satisfy cl 500.211 of sch 2 of the Regulations meant that her application could not succeed as the requirement in that clause was mandatory. Although the applicant had compelling compassionate circumstances arising from her infant son's need for medical care, the Tribunal had no discretion, in dealing with the applicant's application for review of the decision to refuse her a student visa, to excuse her from the requirement to meet the criteria for that visa.

25 In reply, the applicant stated that she didn't attend school for some time as she had to look after her child. She explained that little things could trigger his condition, such as being afraid or having a fall.

CONSIDERATION

26 The Tribunal decision does not involve any jurisdictional error.

27 The applicant's ground, that the Tribunal failed to consider her explanation, is in some respects an accurate description of the manner in which the Tribunal made its decision. The

Tribunal did not, in its reasons, address the compassionate considerations that the applicant had raised in her Personal Statement.

28 However, whilst it is understandable that the applicant is disappointed by the Tribunal's failure to find in her circumstances a compelling basis for the grant of a visa, no jurisdictional error is disclosed by that approach.

29 The Tribunal correctly identified, at [8] of its decision, that the criteria for the grant of the visa sought by the applicant are set out in pt 500 of sch 2 to the Regulations, and that cl 500.211 of sch 2 to the Regulations required the applicant to be enrolled in a "course of study" as defined, being a "full-time registered course". At [12] of its reasons, the Tribunal recorded that the PRISM record did not reveal a current COE and that the applicant had not provided evidence of such enrolment.

30 The Tribunal found at [13]-[14] that the criteria for the grant of the visa were not met, and accordingly concluded at [15] that the decision under review should be affirmed.

31 Although unstated by the Tribunal, that conclusion was compelled by s 65 of the Act. Pursuant to that section, where the Minister is satisfied that the criteria for the grant of a visa are met, the Minister is to grant the visa and conversely, where the criteria for the grant of the visa are not met, the Minister is not to grant the visa. The Tribunal, exercising its review function under pt 5 of the Act, was not empowered to make a decision that was not authorised by the Act or Regulations: s 349(4) of the Act (then in effect). That is, the Tribunal was not empowered to depart from the criteria in the Regulations for the grant of the visa, or, by reference to the applicant's compassionate personal circumstances, purport to waive the application of the criteria in the applicant's case. To the extent the Tribunal did not give weight to the applicant's explanation for not being enrolled, the Tribunal was not in error. That explanation did not demonstrate that the applicant satisfied the criteria for the grant of the visa, and the Tribunal was not empowered to depart from those criteria.

32 As there was no jurisdictional error in the Tribunal's decision, the applicant has not made out a basis for the Court to grant her the relief she seeks, and the application should be dismissed.

33 I will hear the parties as to costs.

I certify that the preceding thirty-

three (33) numbered paragraphs are
a true copy of the Reasons for
Judgment of Judge Doust.

Associate:

Dated: 7 May 2025